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FIBER TECHNOLOGIES NETWORKS, L.L.C.	)	
140 Allens Creek Road	)	
Rochester, NY 14618	)	
	)	
Complainant,	)	
	)	
v.	)	D.T.E. 01-70
	)	
TOWN OF SHREWSBURY ELECTRIC	)	
LIGHT PLANT	)	
100 Maple Avenue	)	
Shrewsbury, MA 01545-5398	)	
	)	
Respondents.	)	
	)	

Pursuant to G.L. c. 25, § 5D, G.L. c. 66, § 10, G.L. c. 4, § 7 cl. twenty-sixth and section 1(c) of the Department's Ground Rules, Fiber Technologies Networks, L.L.C. ("Fibertech") hereby requests that the Department of Telecommunications and Energy (the "Department" or "DTE") grant protection from public disclosure certain confidential, competitively sensitive and proprietary information submitted by Fibertech in accordance with G.L. c. 25, § 5D and the Department's Ground Rules in this proceeding. Specifically, Fibertech requests that any documents it may be required to produce pursuant to SELP 1-6, SELP 1-7, SELP 1-8, SELP 1-12, SELP1-13, SELP 2-6, SELP 2-12, and SELP 3-14 be granted protective treatment because they contain competitively sensitive and highly proprietary Fibertech information and trade secrets, and therefore, under Massachusetts law, are entitled to protection from public disclosure in this proceeding.

## DISCUSSION

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part:

The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter.

The Department has recognized that competitively sensitive information is entitled to protective status. In *Hearing Officer's Ruling on the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement*, the Department found that competitively sensitive and proprietary information should be protected. D.P.U. 95-59B, at 7-8 (1997). In addition, the Department recognized that protection of competitively sensitive and proprietary information is desirable as a matter of public policy in a competitive market. *Id.* Massachusetts courts have considered the following factors in determining whether certain information qualifies as a "trade secret"<sup>1</sup>:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the employer to guard the secrecy of the information;
- (4) the value of the information to the employer and its competitors;
- (5) the amount of effort or money expended by the employer in developing the information; and

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<sup>1</sup> Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, §30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors... It may be a formula treating or preserving material, a pattern for a machine or other device, or a lost of customers." *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc.*, 260 N.E.2d 723, 729 (1970). In addition, Massachusetts courts have recognized that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. The United States Supreme Court has stated that a board has the “right to keep the work which it had done, or paid for doing, to itself.” *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905). Courts in other jurisdictions have found that a “trade secret which is used in one’s business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless... to its owner if disclosure of the information to the public and to one’s competitors were compelled.” *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

The information in the documents requested by SELP is not readily available to competitors and is not considered public information. In addition, the disclosure of such information would allow Fibertech’s competitors and customers to gain access to documents that are routinely considered confidential, proprietary and highly sensitive. This disclosure would place Fibertech at a competitive disadvantage in the marketplace.

The attachment to the response to Information Request SELP 1-6 is all of the executed leases Fibertech has for its dark fiber use by communications carriers. Such leases are highly sensitive because the leases contain specific terms of Fibertech’s service, rates, and other business terms. If such information were to be revealed to Fibertech’s competitors and to the public, it would place Fibertech at a serious disadvantage with respect to negotiating lease terms with other carriers. This information also is sensitive for Fibertech’s customers in that it reveals

their business plans, construction timetables, target markets, and costs. For these reasons, most of these agreements have nondisclosure agreements that require Fibertech to protect sensitive customer information that they do not reveal to their competitors.

In this similar context, the attachment to the response to Information Request SELP 1-7 requests copies of all documents concerning Fibertech's dark fiber customers, including terms and conditions and rates for service offered, and the attachment to the response to Information Request SELP 1-8 requests copies of all documents concerning Fibertech's local exchange voice, interexchange and data services customers. This request is substantially identical to SELP's request for leases and raises similar concerns.

The attachments to the responses to Information Request SELP 1-12 and SELP 1-13 are the business plans, internal memoranda and promotional materials concerning market conditions and economics that may lead Fibertech to offer local exchange voice and data services and cable television services. Such forecast information is extremely proprietary and highly sensitive. These documents represent Fibertech's future business plan regarding the expansion of Fibertech. Fibertech has expended much time, energy and money developing its business plan for the future. If this information were to be made public, Fibertech's competitors would have knowledge about future investments by Fibertech. Such information would enable competitors to alter their business plans in order to stay competitive with Fibertech. In different form Information Requests SELP 2-6, 2-12, and 3-14 seek the same records and therefore the same concerns apply.

## **CONCLUSION**

All of the attachments produced by Fibertech pursuant to SELP's information requests contain extremely proprietary and highly sensitive information. By revealing the information to

the public, Fibertech would be placed at a great disadvantage with respect to both its competitors and its customers. Therefore, Fibertech request that the Department, in accordance with G.L. c. 25, § 5D, grant protective treatment to the attachments to Fibertech's responses to SELP 1-6, SELP 1-7, SELP 1-8, SELP 1-12, SELP1-13, SELP 2-6, SELP 2-12 and SELP 3-14.

Respectfully submitted,

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